Filed 4/5/19 Alkayali v. Boukhari CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AHMAD ALKAYALI, Plaintiff and Appellant, v. FATMA BOUKHARI et al., Defendants and Appellants.	 E066230 (Super.Ct.No. RIC1309291) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

Greenberg Gross, Alan A. Greenberg, and Adam M. Sechooler for Defendants and Appellants.

Tauler Smith and Robert Tauler; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiff and Appellant.

Plaintiff-respondent[1] Ahmad Alkayali sued defendants-appellants Akram Quadri, Fatma Boukhari, Sarah Quadri (the Quadris), Michael Nassar, and NeoCell Corporation (NeoCell) (all together, appellants) under various theories for dissolving a company—HealthWise Nutraceuticals, Inc. (Healthwise)—which they ran together to manufacture the dietary supplements NeoCell sold. According to Alkayali, he owned 72 percent of Healthwise, but the individual defendants dissolved the company and folded its operations into NeoCell without his approval. The appellants claimed Healthwise was a wholly-owned subsidiary of NeoCell and they acted within their authority.

A jury sided with Alkayali, found appellants liable for conversion and breach of fiduciary duty, and awarded Alkayali $4,266,000 in economic damages, $500,000 in noneconomic damages, $185,000 in punitive damages against Akram Quadri individually, and $500,000 in punitive damages against NeoCell. The trial court granted judgment notwithstanding the verdict on the conversion claim, which knocked Nassar and NeoCell out of the case, but allowed the breach of fiduciary duty verdict and related damages awards to stand.

The Quadris challenge the jury's verdict on multiple grounds. They argue Alkayali was required to bring his claims against appellants as cross-claims in a prior litigation over the ownership of NeoCell and that his claims are barred by the judgment in that prior case under the doctrine of res judicata. In the alternative, they argue the jury's finding that Alkayali owned 72 percent of Healthwise was not supported by substantial

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[1] Alkayali filed a cross-appeal, but abandoned it in his opening brief.

evidence. Finally, they attack the damages awards, contending the record lacks substantial evidence to support economic, noneconomic, or punitive damages. Respecting the economic damages, they attack the methodology of Alkayali's economic expert as based on faulty assumptions and dissimilar comparison companies.

After careful review, we affirm the jury's verdict in all respects.

I

FACTS

A. *NeoCell, Healthwise, and the Individual Parties*

Ahmad Alkayali developed a collagen-based nutritional supplement in the 1980s. In 1998, Alkayali gave some of his collagen product to defendant-appellant Akram Quadri, who had suffered from poor health after having a heart attack. Based on his experience with the product, Quadri agreed to invest in a company, defendant-appellant NeoCell, to market collagen-based dietary supplements. At its founding in 1998, Quadri and Alkayali each owned 50 percent of the company.

In 2002, Alkayali sold his 50 percent interest in NeoCell for a monthly consulting fee and an annual bonus of five percent of the annual net profit. After that, Quadri and his spouse, defendant-appellant Fatma Boukhari, owned 100 percent of NeoCell. A 2009 judgment of the Orange County Superior Court in a separate lawsuit against Alkayali confirms their ownership of the company.

NeoCell tried but initially failed to get Costco to carry its products. NeoCell then hired Darren Rude as a sales manager in 2005. Rude already had a relationship with

Costco, and continued trying to get NeoCell products into Costco stores. Initially, he obtained a contract to sell their products in five Costco stores in Hawai‘i. After initial successes, NeoCell started supplying more Costco stores until, eventually, their products were available in Costco stores nationwide and internationally.

In the beginning, NeoCell outsourced the manufacture of its supplements. However, Costco asked NeoCell to develop its own production capabilities. NeoCell responded by recruiting personnel from its contract manufacturer—specifically, defendant-appellant Dr. Michael Nassar, Roger Cleworth, and Derek Burreson—to give them the knowledge to begin manufacturing the supplements. Together, Quadri, Alkayali, and their new recruits founded Healthwise as NeoCell's production unit.

Once up and running, the new company created tablets of collagen supplements using raw materials sourced from outside vendors and packaged those tablets for NeoCell. According to Alkayali, NeoCell was Healthwise's only significant customer, accounting for 99 percent of its business by the time he left. In turn, according to Sara Quadri, the daughter of Quadri and Boukhari, Costco was NeoCell's most significant customer, accounting for 90 percent of its sales by 2010.

Eventually, NeoCell and Healthwise occupied neighboring spaces. Healthwise was located at 1915 South Susan Street in Santa Ana, California. In 2007, NeoCell moved its offices to the space adjacent to Healthwise. The two companies were separated by a wall, but a large opening in the wall allowed for easy movement between them. NeoCell was on the lease for Healthwise's office and NeoCell paid the rent.

B. *Ownership and Corporate Officers of Healthwise*

Though there's disagreement about his precise role at Healthwise, it's uncontested Alkayali helped run the company in some capacity from its founding in 2005 to the date he was removed in 2008. According to Quadri, Alkayali served as a NeoCell consultant and NeoCell paid him $12,000 a month. According to Alkayali, he received that money as his "share of profit" as an owner of Healthwise. Alkayali said he also sold raw materials to NeoCell through his other companies. In total, he said he earned approximately $30,000 per month.

All parties agree that on December 5, 2005, the founders entered a "Shareholder Agreement" purporting to set out the ownership interests in the company. The full agreement provides:

> "The undersigned shareholders of HealthWise Nutraceuticals, Inc. hereby agree the following:
>
> The ownership of HealthWise will be divided as follows:

Ahmad Alkayali	36.00%
Akram Quadri	14.00%
Michael Nassar	16.67%
Roger Cleworth	16.67%
Derek Burreson	16.66%

> It is further agreed that the shares of Michael Nassar, Roger Cleworth, and Derek Burreson will be held by NeoCell Corporation as collateral until all loans provided by NeoCell are paid in full by Healthwise."

All five founders—Quadri, Alkayali, Nassar, Cleworth, and Burreson—signed the agreement.

Alkayali testified the business grew in 2006, but he said there was significant conflict and disagreement within the company. Rude said Quadri was unhappy with the way Healthwise was being run. Quadri thought "[e]mployees weren't working hard enough, and we were all stealing money." Alkayali said he wasn't happy with Cleworth, Nassar, or Burreson. "Roger always is not meeting production. He's always cussing at the employees, you know, so I wasn't happy with his performance. I wasn't happy with Dr. Nassar. Derek wasn't doing anything. So I request[ed] Nassar to call for this meeting [of the Healthwise Board of Directors] to dissolve this partnership."

At a meeting on November 21, 2006, Alkayali and Quadri gave the other three founders a deadline to purchase their interest in Healthwise or sell their own interest back to the company. The minutes of the meeting say Alkayali—the "major shareholder/investor"—was "unsatisfied with the current situations and called for a Motion offering to sell his interest in Healthwise to remaining shareholders." Quadri seconded the motion and offered to sell his interest as well. Cleworth, Burreson, and Nassar said they needed 30 days to consider their options. The board voted to give them until December 27, 2006 to "enter into a Buy/Sell agreement for 100% ownership of 'Healthwise.'"

The leadership of the company changed at the same time. In the beginning, Nassar was the CEO. But at the November 21 meeting, Cleworth resigned as President, Nassar resigned as CEO, and Alkayali was appointed as President and CEO. The next month, the company filed a "Statement of Information" with the California Secretary of

State listing Boukhari as the CEO and CFO. Defendant-appellant Sarah Quadri signed that statement, which identified her as Healthwise's Secretary. Sarah was an office manager at NeoCell, and her supervisor was Alkayali. At trial, she said she filled out the statement of information at Alkayali's direction.

At the end of the 30-day period, Cleworth, Burreson, and Nassar elected not to purchase Alkayali's and Quadri's interest in the company and instead agreed to sell their interests to the company. In early 2007, the parties entered a series of agreements to formalize those transactions. On January 30, 2007, Healthwise, Alkayali, Quadri, Cleworth, and Nassar signed a "General Release Agreement" stating the "'Shareholder Agreement' dated 12-05-05 between the Company and Cleworth, Alkayali, Quadri, Michael Nassar, and Derek Burreson is hereby rescinded and herewith declared null and void." Alkayali signed as the Director of Healthwise and in his individual capacity, Quadri and Cleworth signed individually, and Nassar signed as a witness. Cleworth assigned to Healthwise "any and all shares or ownership promised to him under the 'Shareholder Agreement,'" which "represents the balance of a personal loan to the Company," and released Healthwise, Alkayali, and Quadri from any claims he had against them.

The same day, Healthwise, Alkayali, Quadri, and Burreson entered a nearly identical "General Release Agreement." Alkayali signed as the Director of Healthwise and in his individual capacity, Quadri and Burreson signed individually, and Nassar signed as a witness. The Burreson release contained essentially identical provisions, except Healthwise agreed to pay Burreson $5,000 for "services provided to the Company." Burreson assigned "any and all shares or ownership promised to him" to Healthwise and released the company, Alkayali, and Quadri from any claims he may have.

On February 12, 2007, Healthwise entered a third agreement, this one with Nassar and his consulting firm, DR MFN Pharmaceutical Consulting Services. Quadri and Alkayali were not individual parties to this agreement, though Alkayali signed the agreement as Healthwise's Director. The agreement focuses on establishing Nassar as a consultant for Healthwise. Nassar agreed to commit all his working time over three years to working as a consultant for Healthwise in return for a minimum payment of $6,000 per month, a 10 percent commission on business he generated, and 10 percent of Healthwise's common shares to be distributed in installments over the three-year term of the agreement. The agreement also contained the same language purporting to rescind the "Shareholder Agreement" and assigning to Healthwise "all shares or ownership promised to him" in that prior agreement.

According to Alkayali, these agreements resulted in him having an ownership interest of 72 percent of Healthwise. He said Nassar, Burreson, and Cleworth assigned their half of the ownership interest in the company to the remaining owners of Healthwise, himself and Quadri, in proportion to their existing ownership interests. Since Alkayali owned 36 percent and Quadri owned 14 percent before the assignment, after the assignment, Alkayali owned 72 percent and Quadri owned 28 percent. Alkayali supports his position by pointing to Healthwise tax returns from 2006 and 2007, which represent Alkayali as owning 72 percent of Healthwise stock and Quadri and Boukhari as owning 14 percent each.

Appellants draw a different conclusion from the release agreements. They contend the provisions respecting ownership shares voided the entire Shareholder Agreement, including as it affected Alkayali's and Quadri's ownership interests. Thus, they conclude the promise that Alkayali had 36 percent ownership of Healthwise was no longer effective. Instead, they contend the ownership of Healthwise reverted entirely to NeoCell, which Quadri and Boukhari owned entirely. As further support, they emphasized at trial that NeoCell directly or indirectly funded all of Healthwise's expenses, including by taking out a loan to cover start-up costs. NeoCell paid for Healthwise's equipment, either by directly leasing it for Healthwise or by having the lease payments debited from its bank account. Healthwise was also dependent on NeoCell to make its payroll. Meanwhile, Alkayali never invested any money or other capital in Healthwise, although he did sign some personal guarantees for equipment leases.

C. *The Prior Litigation Over Ownership of NeoCell*

On October 8, 2008, attorneys for NeoCell confronted Alkayali at the offices of NeoCell and Healthwise. The attorneys came into Alkayali's office uninvited and told him he was fired and demanded he immediately collect his personal belongings and leave the premises. According to Alkayali, they told him he "had no ownership interest in

NeoCell or Healthwise Neutraceuticals, Inc. (where I am majority shareholder and CEO) and in the presence of others, falsely accused me of being a liar and forging stock certificates in an attempt to show ownership where . . . none existed."

NeoCell's attorney handed Alkayali a letter terminating him for cause as a NeoCell consultant. The letter gave as its reasons for terminating him (i) he had misrepresented himself as an officer of NeoCell to avoid paying workers' compensation on his wages and (ii) forged certificates showing he and his wife owned 720 out of 1,000 shares of NeoCell common stock. The letter rejected Alkayali's claims to an ownership interest in NeoCell and said, "Healthwise is a subsidiary of NeoCell, and NeoCell owns one hundred percent (100%) of that company. You have no right or interest to Healthwise or any of its assets." The attorneys then escorted Alkayali off the Healthwise and NeoCell premises.

On October 28, 2008, Quadri, Boukhari, and NeoCell filed a complaint in Orange County Superior Court against Alkayali for fraud, trespass, and declaratory relief. The complaint also sought to enjoin Alkayali from going within 500 yards of NeoCell's offices, which would encompass the Healthwise offices. The complaint focused on the same allegations set out in the October 8, 2008 letter to Alkayali regarding his status at NeoCell, but did not raise the issue of Alkayali's ownership interest in Healthwise. On November 21, 2008, the trial court issued a preliminary injunction barring Alkayali from NeoCell's offices.

Alkayali filed an answer and cross-complaint on December 1, 2008. The answer denied the allegations in the complaint and raised affirmative defenses. The separate cross-complaint sought damages for breach of fiduciary duty, fraud, constructive fraud, unjust enrichment, assault, and battery, as well as a declaration that the Alkayalis owned 72 percent of NeoCell. All these claims relate to the question whether the Alkayalis held an ownership interest in NeoCell. The cross-complaint does not mention Healthwise. On December 18, 2008, Alkayali filed an ex parte application seeking to modify the preliminary injunction on the grounds that Alkayali "was the majority stockholder" of Healthwise, and the injunction was therefore overbroad. The court denied the motion. Alkayali again sought to modify the preliminary injunction on the same grounds on July 22, 2009, and the court again denied his motion.

On July 29, 2009, following a trial, the court issued a statement of decision declaring Quadri and Boukhari were the sole owners of NeoCell. The court issued a permanent injunction preventing Alkayali from accessing the NeoCell and Healthwise premises. The court found NeoCell stock allegedly issued to Alkayali "was as a direct result of [Alkayali's] plan or scheme to defraud the State Fund with respect to workers compensation premiums." Alkayali appealed, and the Court of Appeal, Fourth District, Division Three affirmed. In his appeal, Alkayali again claimed the injunction barring him from the NeoCell and Healthwise offices was improper because of his alleged ownership of Healthwise. The Court of Appeal did not address the argument because it was raised in pretrial motions and "should have been raised at trial."

D. *NeoCell Dissolved Healthwise and Moved Manufacturing In-House*

While that litigation proceeded, NeoCell decided to absorb Healthwise. On November 25, 2009, NeoCell held a board of directors meeting and formally resolved to "cease placing orders with Healthwise and commence manufacturing in-house." The decision changed nothing about the operation of Healthwise. It retained the same employees, stayed in the same location, and used the same equipment. The only differences were they started referring to it as NeoCell and Rude resigned from the board.

On February 11, 2010, Alkayali's lawyer sent a letter to Boukhari and Sarah Quadri requesting information on Healthwise's financial status. The letter asserted Alkayali owned 72 percent interest in Healthwise, demanded Healthwise call a special meeting of shareholders by the end of March 2010, and asked them to provide Alkayali with numerous financial records from 2008 and 2009. Boukhari and Quadri didn't comply.

On April 19, 2010, Healthwise filed with the California Secretary of State a certificate of election to wind up and dissolve the corporation. The certificate says the corporation did not issue any shares and the board of directors made the decision to dissolve. Quadri and Boukhari signed the certificate as directors, representing themselves as a majority of the directors of the corporation.

On July 29, 2010, NeoCell's attorneys responded to the letter from Alkayali's attorney. The letter rejected Alkayali's claim to own any portion of Healthwise and reported Healthwise was not conducting business and "the majority of the shareholders of

Healthwise plan to dissolve the company." The letter included a notice of shareholder meeting for Healthwise, which they provided "in an abundance of caution" and without acknowledging Alkayali owns any shares of Healthwise. On August 11, 2010, Alkayali's attorney emailed NeoCell's attorney to say Alkayali owned 72 percent of Healthwise and objected to the winding up and dissolution of the company.

Healthwise held a special shareholder meeting on August 12, 2010. Alkayali did not attend, he says because the injunction forbade him from doing so. NeoCell's attorneys presented a report concluding NeoCell was the only shareholder of Healthwise and Alkayali did not have an interest in the company. Quadri, identified as the President of Healthwise, reported there was no further need for the corporation to conduct business and proposed it be dissolved and any assets be transferred to NeoCell. The shareholders then voted to dissolve Healthwise. Quadri, Nassar, and Sarah Quadri, identifying themselves as the sole or a majority of the company's directors, signed a certificate of dissolution the same day, and filed it with the California Secretary of State on September 3, 2010, formally dissolving Healthwise.

According to Nassar, nothing changed with respect to manufacturing NeoCell products after Healthwise was dissolved. The parties agree Alkayali received nothing when Healthwise dissolved. According to appellants, Healthwise was not profitable for most of its existence and had no tangible assets at dissolution.

E. *Alkayali's Lawsuit and the Jury's Verdict in His Favor*

On August 8, 2013, Alkayali filed a complaint alleging Healthwise had significant assets when it was dissolved and Alkayali had not been compensated for his share of those assets. Alkayali amended his complaint on October 28, 2013, and defendants answered on August 11, 2014.

On March 13, 2015, defendants moved for summary judgment. Among other things, they argued Alkayali's claims were barred by res judicata and the compulsory cross-complaint statute (Code Civ. Proc., § 426.30). The court denied the motion. Ultimately, the case proceeded to trial on causes of action for breach of fiduciary duty and conversion.

Before trial started, defendants brought two motions in limine relevant to their appeal. They argued the Healthwise tax returns showing Alkayali had a 72 percent interest in Healthwise should not be admitted because they were hearsay and privileged. They also argued against allowing Alkayali's business valuation expert to testify because he was using a legally impermissible and unreliable valuation method and his opinion was based on an assumption that was contrary to the evidence. The trial court denied both motions. We discuss their background in the discussion section *post*.

Trial began on October 30, 2015 and lasted 14 days. On December 3, 2015, the jury returned a verdict finding that Alkayali owned 72 percent of Healthwise when it was dissolved. The jury awarded Alkayali $4,266,000 in economic damages and $500,000 in noneconomic damages. The jury also found Alkayali was entitled to punitive damages against Quadri and NeoCell, but not Boukhari, Sarah Quadri, or Nassar. In a second trial phase, the jury awarded Alkayali $185,000 in punitive damages against Quadri and $500,000 against NeoCell.

Defendants moved for a new trial and for judgment notwithstanding the verdict. The court granted the motion for judgment notwithstanding the verdict with respect to Alkayali's conversion claim, finding "Healthwise had no assets upon dissolution." The court explained "[r]egardless of the allegations set forth in the first amended complaint, there is no question that the conversion claim *presented to the jury* was based upon the alleged conversion of assets that occurred prior to dissolution." The court therefore held Alkayali's conversion claim was a derivative claim that belonged to Healthwise. The court also concluded a direct claim for conversion of Alkayali's shares in Healthwise would be barred by the statute of limitations. However, the trial court denied defendants' motions with respect to the breach of fiduciary duty verdict, though without giving reasons for its ruling.

On June 1, 2016, the court entered an amended judgment in favor of Alkayali against Quadri, Boukhari, and Sarah Quadri. The court recounted the jury's findings and adjudged Quadri, Boukhari, and Sarah Quadri jointly and severally liable for $4,766,000, but reduced the judgment amount to $4,300,117.30 to account for what Alkayali owed NeoCell on a previous judgment. The court also entered judgment against Quadri for $185,000 in punitive damages. Because conversion was the only cause of action against NeoCell and Nassar, the court entered judgment in their favor.

The Quadri defendants filed a timely appeal. Alkayali filed a cross-appeal challenging the ruling on his conversion claim, but has abandoned that appeal. Defendants Nassar and NeoCell filed a protective cross-appeal, but since Alkayali abandoned his appeal, we need not address it. The only issues remaining concern the Quadris' challenges to the breach of fiduciary duty verdict and the damages awarded against them.

II

DISCUSSION

A. *Res Judicata and Compulsory Counterclaims*

The Quadris argue Alkayali's breach of fiduciary duty claim is barred under the compulsory cross-complaint statute (Code Civ. Proc., § 426.30, subd. (a)) and the doctrine of res judicata. We disagree.

1. *Compulsory counterclaims*

The compulsory cross-complaint statute aims to prevent piecemeal litigation. (*Carroll v. Import Motors, Inc.* (1995) 33 Cal.App.4th 1429, 1436.) As the Supreme Court explained in *Flickinger v. Swedlow Engineering Co.* (1955) 45 Cal.2d 388, 393, the Legislature intended "to provide for the settlement, in a single action, of all conflicting claims between the parties arising out of the same transaction. [Citation.] Thus, a party cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demands or defenses; he may not submit his case in piecemeal fashion."[2]

Code of Civil Procedure section 426.30, subdivision (a) (Section 426.30(a)) provides, "if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded."

To invoke the statute, a party must establish the new claim is logically related to the prior action. Code of Civil Procedure section 426.10, subdivision (c) defines the phrase "related cause of action" as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." Because we have been directed to construe Section 426.30(a) broadly, we interpret "transaction" broadly to include "a series of acts or occurrences logically interrelated [citations]." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 960.)

Section 426.30(a) also "includes a timing element. The related cause of action must be one that was in existence at the time of service of the answer [citation];

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[2] The Supreme Court there discussed the predecessor of section 426.30 (former Code Civ. Proc., § 439), which provided, "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." (Former Code Civ. Proc., § 439, as amended by Stats. 1941, ch. 454, § 2, p. 1751, & repealed by Stats. 1971, ch. 244, § 42, p. 389.)

otherwise, the failure to assert it in prior litigation is not a bar under the statute." (*Align Technology, Inc. v. Tran*, *supra*, 179 Cal.App.4th at p. 960.) A related cause of action that arises *after* the party has filed their answer is *permissible*, not compulsory. (*Crocker Nat. Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864.)

Here, regardless whether Alkayali's claim that the Quadris breached their fiduciary duty is logically related to the dispute over the ownership of NeoCell, Alkayali's claims arose *after* he had already answered the Quadris' complaint. Quadri, Boukhari, and NeoCell filed the complaint in the Orange County litigation on October 28, 2008. Alkayali filed an answer and cross-complaint on December 1, 2008. Alkayali's claim that the Quadris breached their fiduciary duty to him as a Healthwise shareholder by winding up the corporation and integrating it with NeoCell concern events that occurred in November 2009 or later.[3]

NeoCell decided to absorb Healthwise in 2009. The company held a board of directors meeting on November 25, 2009 where the board formally resolved to "cease placing orders with Healthwise and commence manufacturing in-house." Healthwise filed a certificate of election to dissolve with the California Secretary of State on April 19, 2010. On July 29, 2010, NeoCell's attorneys informed Alkayali "the majority of the shareholders of Healthwise plan to dissolve the company." And Healthwise held a special shareholder meeting on August 12, 2010, where the shareholders resolved to

[3] We grant appellants' motion asking us to take judicial notice of a February 10, 2017 minute order of the trial court in the Orange County lawsuit. (Evid. Code, § 452.) The minute order does not affect our analysis.

dissolve Healthwise. Quadri, Nassar, and Sarah Quadri all signed a certificate of dissolution the same day, and filed it with the California Secretary of State on September 3, 2010. These acts gave rise to Alkayali's claims, and all of them occurred *after* Alkayali filed his answer to the Quadris' complaint in Orange County, making the claims permissive, not compulsory, counterclaims. The trial court did not err in reaching the same conclusion.

The Quadris argue "[t]he gravamen of Alkayali's claim is that Appellants improperly asserted ownership over Healthwise and took its assets" and that "breach occurred when Alkayali was removed from Healthwise and NeoCell took control of its assets and operations." We disagree. Alkayali's claims concern the termination of Healthwise as a going concern and the decision to integrate Healthwise with NeoCell despite his ownership interest in Healthwise. Those events undisputedly occurred long after Alkayali filed his answer in the dispute over his expulsion from NeoCell. And though the injunction barring him from NeoCell also effectively barred him from entering the premises at Healthwise, it did not bar him from the benefits of ownership in the company. Had the Quadris continued to operate Healthwise as a separate business after they took control over it, Alkayali could have sued for a declaration of his ownership interest, but he would not have been able to establish the economic injury he did here.

2. *Res judicata*

The Quadris' assertion that res judicata bars Alkayali's claims in this lawsuit is similarly unavailing. "A prior judgment is not res judicata on a subsequent action unless three elements are satisfied: '1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. [Citation.] Even if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.''" (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 685-686.)

Here, as we have discussed, the first lawsuit involved the ownership of NeoCell, and the questions whether Alkayali had misrepresented himself as an officer of NeoCell to avoid paying workers' compensation on his wages and forged certificates showing he and his wife owned shares of NeoCell common stock. The complaint did not raise the issue of Alkayali's ownership interest in Healthwise, and neither did Alkayali's cross-complaint. The later litigation, by contrast, concerned the propriety of the Quadris' handling of the affairs of Healthwise after they had obtained a restraining order that kept Alkayali from the Healthwise offices. We conclude there was no identity of the issues decided in the prior Orange County litigation and the trial in this case.[4] The court therefore did not err by concluding res judicata did not bar Alkayali's claims.

Having addressed these threshold issues, we now turn to the Quadris' arguments that the jury's verdict was not based on sufficient evidence.

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[4] We note the Quadris assert only claim preclusion (res judicata), not issue preclusion (collateral estoppel), so we have no occasion to address the latter doctrine.

B. *Sufficiency of the Evidence for Alkayali's Ownership Interest in Healthwise*

The Quadris argue Alkayali did not present sufficient evidence to uphold the jury's conclusion he held a 72 percent ownership interest in Healthwise. They argue the only evidence supporting that conclusion came in the form of Healthwise tax returns prepared by Alkayali's personal accountant, and argue those were inadmissible.[5] We disagree with this characterization of the state of the evidence.

When an appellant challenges a jury verdict as unsupported, we review for substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) We view the evidence in the light most favorable to the prevailing party, giving that party the benefit of reasonable inferences and resolving conflicts in its favor. (*Ibid*.) Next, we "determine whether the evidence thus marshaled is substantial . . . [T]his does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.'" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "Substantial" means the evidence "must be of ponderable legal significance

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[5] At trial, Alkayali supported his claim to own a portion of Healthwise with copies of unsigned Healthwise tax returns showing he owned 72 percent of the company shares. The Quadris argue those documents were admitted improperly because their contents are hearsay, not subject to an exception. Alkayali argues the tax returns were admissible both as business records and as adoptive party admissions. We need not resolve this dispute because we conclude Alkayali presented sufficient evidence to uphold the jury verdict without taking the tax returns into consideration.

. . . reasonable[,] credible, and of solid value.'" (*Ibid.*) At bottom, we must determine "whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Ibid.*)

The principal parties gave conflicting testimony about the ownership of Healthwise. Quadri claimed the company was owned entirely by NeoCell, and therefore by himself and his wife. But Alkayali testified he owned a 72 percent stake in the company. He explained his conclusion by referring to the parties' 2005 shareholder agreement—signed by Quadri and Alkayali among others—which says the ownership of Healthwise would be divided to give Quadri 14 percent and Alkayali 36 percent. The same agreement gave the other 50 percent of the ownership to Nassar, Cleworth, and Burreson, but those three later agreed, under pressure from Alkayali and Quadri, to sell back their interest to Healthwise. According to Alkayali, those transactions resulted in Alkayali and Quadri doubling their interest to 72 percent and 28 percent, respectively.

Other evidence supported Alkayali's position that he owned a substantial share of the company. In the minutes of the special meeting of the board of directors at which Alkayali and Quadri pressured the other three founders to buy them out, Alkayali is identified as "the major shareholder/investor." Quadri was present at that meeting. Jorge Hodgers, a Healthwise consultant, said Alkayali identified himself as the "president/owner" in 2007 and Quadri identified himself as the "new owner" after forcing Alkayali out in 2008.

The jury could reasonably have concluded from all this evidence that Alkayali did own a 72 percent interest in Healthwise. Indeed, the jury could have credited the testimony of Alkayali on its own, and that would have constituted substantial evidence to sustain the jury's verdict. "Under the principles governing review for the existence of substantial evidence, the testimony of a witness is ordinarily sufficient to uphold a judgment 'even if it is contradicted by other evidence, inconsistent or false as to other portions.'" (*People v. White* (2014) 230 Cal.App.4th 305, 319, fn. 14; see also Evid. Code, § 411 ["the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) We may reject such testimony as insufficient only when "it is inherently improbable or incredible, i.e., 'unbelievable per se,' physically impossible, or 'wholly unacceptable to reasonable minds.'" (*White*, at p. 319, fn. 14.) Alkayali's testimony does not suffer such defects.

The corroborating evidence adds additional support to the jury's conclusion that Alkayali owned an interest in Healthwise. We therefore reject the Quadris' substantial evidence challenge to the jury's finding that Alkayali owned 72 percent of Healthwise.

C. *Sufficiency of the Evidence on Damages*

As we noted above, the jury found in favor of Alkayali on his claim for breach of fiduciary duty.[6] The jury awarded Alkayali economic damages of $4,266,000 and noneconomic damages of $500,000. They found Quadri, Boukhari, Sarah Quadri, and

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[6] The jury also found for Alkayali on his conversion claim, but the trial court granted judgment notwithstanding the verdict on that claim, and Alkayali has abandoned his appeal on that issue.

Nassar acted with malice, fraud, or oppression toward Alkayali. They awarded $185,000 in punitive damages against Quadri, but didn't award punitive damages against Boukhari, Sarah Quadri, or Nassar.

Defendants challenge each of these awards on the ground they were not supported by substantial evidence. We take each issue in turn.

1. *Economic damages*

a. *Background*

Alkayali put forward Christian Tregillis, a certified public accountant who specializes in financial accounting and economic investigations, to provide an expert opinion on Alkayali's economic damages. Tregillis's credentials, methodology, and opinion are set out in a report, which has schedules containing the factual basis for his valuation opinion. He testified about the details of those schedules, and Alkayali published them to the jury. Appellants do not challenge Tregillis's qualifications as an expert, but rather the assumptions and methodology he used to reach his conclusion that Healthwise was worth $5.65 million, and Alkayali's 72 percent share of the company was worth $4.06 million.

Tregillis said there are three common methods used to value a business—the market approach, the income approach, and the asset-based approach. Tregillis used the market approach, which estimates the value of a company in much the same way real estate appraisers estimate the value of a house—by looking at comparable sales. The appraiser looks at recent sales of comparable companies and uses the agreed sale prices as a starting point for estimating what the subject company is worth. The appraiser then looks to the financials of the comparable companies to determine the relationship between their financial performance and their sale prices. For example, if a comparable company sold for $5 million, and it had $1 million in sales, other things being equal, the appraiser would project a comparable company with $2 million in sales would sell for about $10 million. If a company sold for $2 million on earnings of $500,000, other things being equal, the appraiser would project a comparable company with $1 million in annual earnings to sell for $4 million.

Tregillis explained the goal of such a valuation is to determine what a willing buyer and a willing seller would agree to as a sale price for the company. Past performance is important to such an evaluation, but the emphasis is on projecting what will happen after the sale. Accordingly, Tregillis began by examining Healthwise's income statements. From those data, he created schedules which allowed him to analyze changes in revenue and expenses over time. Healthwise's income from sales grew from $486,000 in 2006 to $1.2 million in 2007, decreased to $200,000 in 2008, and then increased to $3.45 million in 2009. We reproduce Healthwise's other key financial data in Table 1.

TABLE 1	**2006**	**2007**	**2008**	**2009**
Income	$ 486,481	$ 1,208,038	$ 201,213	$ 3,546,035
Costs	$ 47,056	$ 409,070	$ 24,735	$ 2,632,851
Gross Profit	$ 439,425	$ 798,968	$ 176,478	$ 913,183
Expenses	$ 660,933	$ 984,408	$ 11,834	$ 1,068,613

Net Income	($ 221,508)	($ 185,440)	$ 164,644	($ 156,230)

According to the information Tregillis possessed, Healthwise's income, costs, gross profits, and expenses were trending strongly upward, except for a year of significant decline in 2008. However, the company consistently showed a steady negative net income in the low hundred thousands, again excepting 2008, when the company had a positive net income. The information Tregillis used came from the end of 2009 and early 2010, the last information available before NeoCell stopped operating Healthwise as a separate concern. Tregillis said he believed the valuation would have been higher, not lower, if he had had information from later in 2010 because by then Healthwise and NeoCell were expanding sales into Walmart and Sam's Club stores.

Tregillis said he chose to use Healthwise's sales data as a basis for his valuation because he had reason to doubt the information he had about costs and expenses. He performed his market valuation of Healthwise by identifying companies he determined were comparable and calculating the relationship between their annual sales and the prices at which the companies sold. He compiled that information from a private subscription-based database called "Pratt's Stats - Private Company Merger and Acquisition (M&A) Transaction Database, Business Valuation Resources" (Pratt's Stats or the database). Pratt's Stats identifies companies using a "Standard Industry Classification" (SIC) code, and those groupings formed Tregillis's basis for classifying the companies for analysis.

Tregillis looked at transactions involving four different kinds of companies: (i) private companies that prepare and manufacture pharmaceuticals, (ii) public companies that prepare and manufacture pharmaceuticals,[7] (iii) private companies that manufacture miscellaneous items, and (iv) public companies that manufacture miscellaneous items. In the end, he said he excluded transactions for public miscellaneous manufacturers from his analysis because there were only four of them and "[t]wo of them had negative sales, and the number was higher than the private."

For private pharmaceutical manufacturers, he identified 28 sales transactions between January 2006 and October 2011. He excluded 20 of the transactions for a variety of reasons. Eleven of the companies had no sales in the year before the company sold, so they were not useful in determining the relationship of prior net sales to the sale price of the company. He also excluded those companies whose description in Pratt's Stats didn't say they performed manufacturing because companies that developed pharmaceuticals without manufacturing them were not truly comparable.

In the end, Tregillis considered sales of eight companies in the private pharmaceutical manufacturing category. Their sales prices ranged from just over $5 million to more than $87 million, their net sales in the year prior to sale ranged from $179,686 to just over $6 million, and the ratio of their sales prices to their net sales

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[7] Tregillis explained public companies are companies whose shares are traded on a stock exchange and private companies are companies whose shares are not traded on a stock exchange.

ranged from 2.03 to 37.85. Tregillis calculated the average multiple for those companies as 13.02 and the median multiple as 8.29. We set out the data from those eight transactions and descriptions of the companies' businesses in Table 2 below.

TABLE 2

	Private Pharmaceutical Business	Sale Price	Net Sales	Multiple
1	Manufacturer of mineral dietary supplements and feed supplements	$ 17,352,000	$ 6,022,000	2.88
2	Pharmaceutical company	$ 87,047,000	$ 2,300,000	37.85
3	Female birth control products	$ 21,100,000	$ 1,476,036	14.30
4	FDA licensed manufacturer of allergenic extracts for immunotherapy	$ 10,497,956	$ 5,166,249	2.03
5	Specialty pharmaceutical business (focused on the cough and cold markets)	$ 11,859,290	$ 5,829,580	2.03
6	Biopharmaceutical company	$ 36,296,000	$ 2,650,880	13.69
7	Prescription antibiotic used to treat infections of the throat, ear and respiratory tract	$ 6,100,000	$ 2,422,000	2.52
8	Biopharmaceutical company	$ 5,183,879	$ 179,686	28.85

Tregillis took the median multiple from the private pharmaceutical group and applied it to Healthwise's sales for the most recent complete year, 2009. That calculation (8.29 x $3,546,035) yielded a market value estimate of $29,378,897 for Healthwise.[8]

For public pharmaceutical manufacturers, he identified 189 sales transactions in the Pratt's Stats database. He excluded most of the transactions, and identified 28 as comparable corporate sales. Tregillis calculated the average multiple for those companies as 4.78 and the median multiple as 1.06. He took the median multiple and

[8] In fact, 8.29 times $3,546,035 equals $29,396,630. The difference is unexplained.

applied it to Healthwise's sales for 2009 (1.06 x $3,546,035), which yielded a market value estimate of $3,776,463 for Healthwise.[9] He then applied a discount for lack of marketability and a control premium, which yielded a net premium of 15.4 percent. Applied to the Healthwise valuation, that premium yielded an adjusted market value estimate of $4,359,058.[10] This calculation is reflected in the schedules shared with the jury, but Tregillis did not explain why he applied the premium and discount in his testimony.

For private miscellaneous manufacturers, Tregillis identified 17 sales transactions in the Pratt's Stats database. He excluded most of the transactions, and identified five as comparable corporate sales. Their sales prices and net sales covered a broad range, and the ratio of their sales prices to their net sales ranged from 0.16 to 0.80. Tregillis calculated the average multiple for those companies as 0.52 and the median multiple as 0.54. The schedule Tregillis included in his report did not provide much information about the comparable companies' businesses, just that each was involved in manufacturing, in one case manufacturing home improvement products. Tregillis took the median multiple from the private miscellaneous manufacturers group and applied it to

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9 In fact, 1.06 times $3,546,035 equals $3,758,797 (rounded to the nearest dollar). The difference is unexplained.

10 In fact, increasing $3,776,463 by 15.4 percent yields an adjusted estimate of $ 4,358,038 (rounded to the nearest dollar). The difference is unexplained.

Healthwise's sales for 2009. That calculation (0.54 x $3,546,035) yielded a market value estimate of $1,914,859 for Healthwise.

Finally, Tregillis combined the estimates he'd derived from private and public pharmaceutical company sales and private miscellaneous manufacturing company sales. He determined he should weigh the estimates from the two pharmaceutical groups equally, so he added the estimates and divided by two, which yielded an adjusted market value estimate of $16,868,978. He then determined he should give the estimate derived from private miscellaneous manufacturing company sales ($1,914,859) three times the weight of the estimate derived from the pharmaceutical company sales ($16,868,978). He didn't explain this decision other than to say doing so was "conservative," meaning it yielded a lower market valuation for Healthwise. That final market value estimate for Healthwise, rounded to the nearest $10,000, was $5,650,000. Tregillis assumed Alkayali had a 72 percent ownership interest in the company, and calculated his interest to be worth $4,068,000.

Tregillis said his analysis of Healthwise's value as a business assumed there would be little change in the business arrangement between NeoCell and Healthwise. Alkayali's attorney asked on direct whether he "assumed in any way in your analysis that NeoCell was not allowed to change the business relationship of Healthwise in any way?" He responded, "Yes. That's one of the questions that I had. And I actually asked you, I said, What am I to assume here about what's going to happen in the future with NeoCell and Healthwise and how they might act going forward? . . . [¶] . . . [T]here was this relationship between Healthwise and NeoCell that had been put together. It was working. You had success. You had expansion and relationships with Costco. . . . But is it possible that NeoCell could say, You know what? We're going to change this. We're going to do our own manufacturing now in the future. In that case, Healthwise probably wouldn't be worth very much, basically, would just shut it down. [¶] So I asked you, Is it reasonable to assume that—is there some mechanism that says it's not possible for Mr. Quadri to take the company, take the manufacturing, take the operations away, create its own operations."

On cross-examination, Tregillis confirmed his opinion on the value of the company rested on "an assumption that Al Quadri and NeoCell couldn't terminate the business relationship with Healthwise." He made the assumption at the direction of Alkayali's attorney, and believed the assumption was based on the fact Quadri was an employee and director of Healthwise and the legal principle that his role gave rise to a fiduciary duty to other shareholders not to shut down the company, where he was a minority shareholder, and incorporate its operations into NeoCell, where he and his wife were the sole shareholders.

Tregillis also explained why he chose to use the market approach to valuing Healthwise over the other valuation methods. He said Healthwise's financials left him concerned NeoCell had manipulated the financial information to make Healthwise seem less profitable.

First, the cost to Healthwise of the products it was selling had held between 10 to 12 percent of sales for 2006 and 2007, increased to 33 percent in 2008, and then jumped to 73 percent in 2009. If these 2009 costs had stayed at the lower levels of the previous years, Healthwise would have shown an additional $1.9 million in revenues.

Second, NeoCell issued “credit memos” to Healthwise, which transferred costs on NeoCell’s books to Healthwise’s books. These transferred costs included legal fees NeoCell incurred in its litigation with Alkayali over the ownership of NeoCell. Tregillis said he doubted the accuracy of the Healthwise financial statements because of these irregularities. He said he viewed the credit memos as transfers of costs from NeoCell to Healthwise, which made NeoCell appear profitable and Healthwise appear unprofitable.

Absent those concerns, Tregillis said he would have used the income approach to valuing Healthwise. That approach looks to future income and asks what a projected income stream would be worth today. However, he ruled that approach out because of his concerns about the accuracy of Healthwise’s financial statements. He ruled out the asset-based approach, he said, because it’s appropriate only to value a company in liquidation.

The defendants countered Tregillis’s testimony with testimony by their own expert on valuation, Richard Holstrom, also a certified public accountant. Like Tregillis, Holstrom based his opinion on Healthwise’s financial statements and an analysis of comparable companies. He agreed the two primary methodologies used to value a company are the market approach and the income approach.[11] Holstrom said he relied on the market approach for 30 percent of his appraisal of Healthwise, and relied on the income approach for 70 percent. Using that combined approach Holstrom determined Healthwise's value was $212,000, which meant, if Alkayali owned 72 percent of the company, his ownership interest would have been worth $154,000.

Holstrom explained he thought there should be a discount applied to Healthwise's value to adjust for the risk of having a single customer, and that he believed Tregillis improperly assumed NeoCell would continue to do business with Healthwise. He also said he believed the multiples in Tregillis's report for the private sales of pharmaceutical-preparation companies were too high; he said he would use "lower multiples on the same base."

The jury evidently credited Tregillis's testimony over Holstrom's, as it awarded Alkayali economic damages of $4,266,000, slightly more than Tregillis used as his damages estimate.

b. *Fiduciary duty*

Appellants argue Tregillis's opinion did not provide substantial evidence of the value of Healthwise because he based it on a demonstrably false assumption—that NeoCell could not simply cease using Healthwise to manufacture its collagen supplements because Quadri owed a fiduciary duty to Healthwise to maintain their business relationship. According to appellants, Quadri did not have a fiduciary duty to

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[11] Holstrom also relied on Pratt's Stats.

Healthwise as a matter of law. They moved for judgment notwithstanding the verdict and for a new trial on this ground and appeal the trial court's order denying those motions.

A party is entitled to judgment notwithstanding the verdict only if no substantial evidence supports the verdict. (Code Civ. Proc., § 629; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) We review a trial court's denial of a motion for judgment notwithstanding the verdict by asking whether the record, viewed in the light most favorable to the verdict, contains evidence that is reasonable, credible, and of solid value sufficient to support the verdict. (*King v. State of California* (2015) 242 Cal.App.4th 265, 288.) In other words, we review for substantial evidence. We review de novo any legal issues that arise in our review of the denial of the trial court's order. (*Ibid*.) Generally, we review the denial of a new trial motion for an abuse of discretion, but where the challenge relates to factual support, we review the record for substantial evidence. (*Sandoval v. Los Angeles County Dept. of Public Social Services* (2008) 169 Cal.App.4th 1167, 1176, fn. 6.)

Here, it's clear under California law officers and directors of a corporation owe a fiduciary duty to the corporation's shareholders. (*Professional Hockey Corp. v. World Hockey Assn.* (1983) 143 Cal.App.3d 410, 414.) "Well-established principles of corporations law hold that a 'director cannot, by reason of his position, drive a harsh and unfair bargain with the corporation he is supposed to represent.' [Citation.] '[Directors'] dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director

. . . not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. [Citation.] The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.'" (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 31-32, fn. omitted.) It's the job of the factfinder, here the jury, to determine whether an officer or director's conduct breached the fiduciary duty. (*Ibid.*)

Substantial evidence supports a finding that Quadri, Boukhari, and Sarah Quadri were officers and board members of Healthwise at the critical time. On April 19, 2010, Healthwise filed with the California Secretary of State a certificate of election to wind up and dissolve the corporation. Quadri and Boukhari signed the certificate as directors, representing themselves as a majority of the directors of the corporation. At a special shareholder meeting on August 12, 2010, Quadri, identified as the President of Healthwise, reported there was no further need for the corporation to conduct business and proposed it be dissolved and any assets be transferred to NeoCell. The shareholders (except Alkayali, who was not present) then voted to dissolve Healthwise. The same day, Quadri, Nassar, and Sarah Quadri, identifying themselves as a majority of the company's directors, signed a certificate of dissolution, and filed it with the California Secretary of State on September 3, 2010, formally dissolving Healthwise. We conclude there was solid, credible evidence from which the jury could conclude the three individual defendants were acting as officers or directors of Healthwise throughout the period when they sought to take manufacturing in-house.

As we have already discussed, there was also substantial evidence Alkayali was a shareholder of Healthwise at the relevant time. Specifically, the record supports the jury's conclusion Alkayali owned 72 percent of Healthwise when the defendants worked together to dissolve the company, without consulting him and against his formal objection. It follows that the jury had an evidentiary basis from which to conclude the defendants owed Alkayali a fiduciary duty to conduct the business of Healthwise in a manner that was fair from the standpoint of Alkayali.

Finally, the jury also had substantial evidence to conclude it would be a breach of that fiduciary duty because it was self-dealing for Quadri and his family to shut down Healthwise and incorporate it as a unit of NeoCell. It follows Tregillis's assumption was neither contrary to the law nor contrary to the evidence submitted to the jury, and his opinion did not suffer from a defective assumption.

c. *Unreliable expert methodology*

Appellants also argue there was no substantial evidence of economic damages. They argue Tregillis's valuation testimony was the only evidence of economic damages, and the trial court erred by admitting his testimony because it is based on comparisons of the resale value of noncomparable corporations. "To establish Healthwise's supposed value, Tregillis compared Healthwise to a group of companies that, on their face, have no similarity to Healthwise." According to appellants, these companies were not "reasonably comparable" and that means the trial court should have excluded his testimony as amounting to a "guess, surmise or conjecture" which could not "assist the trier of fact to evaluate the issues it must decide." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 (*Sargon*).)

The trial court has a substantial gatekeeping responsibility. "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801.) Our Supreme Court has held subdivision (b) permits the trial court to determine whether the matter is of a *type* on which an expert may reasonably rely. (*Sargon*, *supra*, 55 Cal.4th at p. 770.) That means "'the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.'" (*Ibid*.)

The trial court may also consider whether the material an expert relies on actually supports their reasoning. '"A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" (*Sargon*, *supra*, 55 Cal.4th at p. 771.) Under Evidence Code section 802, "A witness testifying in the form of an opinion may state . . . the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

Taken together, these provisions give the trial court the responsibility to act as a gatekeeper and authorize it "to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, *supra*, 55 Cal.4th at pp. 771-772.) Nevertheless, the court "must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions. The high court warned that the gatekeeper's focus 'must be solely on principles and methodology, not on the conclusions that they generate.'" (*Id.* at p. 772.) "The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." (*Ibid.*)

"Except to the extent the trial court bases its ruling on a conclusion of law (which we review de novo), we review its ruling excluding or admitting expert testimony for abuse of discretion. [Citations.] A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.'" (*Sargon*, *supra*, 55 Cal.4th at p. 773.) Here, we are asked to decide whether the trial court properly exercised its discretion to allow Tregillis to testify as to the value of Healthwise as a going concern based on evidence of sales transactions of corporations with businesses that differed substantially from the manufacture of collagen supplements.

We conclude the trial court did not err in finding Tregillis's opinion adequately rooted in fact to warrant presenting it to the jury. First, Tregillis explained he chose to use the market approach to valuing Healthwise instead of the income method because he had identified irregularities in Healthwise's financial documents. Those irregularities included an increase in the company's costs from 10 to 12 percent of sales to 73 percent in 2009, after the Quadris had taken control. Tregillis also questioned the use of "credit memos" transferring costs on NeoCell's books to Healthwise's books, including legal fees incurred in the litigation over the ownership of NeoCell. This evidence provided Tregillis with a sound basis for rejecting the income approach in favor of the market value approach to valuing the company.

Tregillis's reliance on data from the Pratt's Stats database also provided a reasonable basis for him to identify sales of comparable corporate companies. The expert used the database SIC codes to identify manufacturing firms that may be comparable. He then used the descriptions of their businesses to exclude companies that were obviously not comparable. For example, he excluded from the list of pharmaceutical companies, those whose description didn't say they performed manufacturing, because companies that developed pharmaceuticals without manufacturing them were not truly comparable. He also excluded all the companies on the list of public manufacturers of miscellaneous goods as noncomparable.

The Quadris complain that one of the companies he compared to Healthwise "developed vaccines for cancer and HIV . . . Another conducted preclinical studies on the 'development of neural stem cells for the treatment of Parkinson's disease.'" However, appellants' argument depends on cherry picking from these companies' business descriptions to make them sound like they are heavily tilted toward research and development. According to the database and Tregillis's schedule, one of the companies "develops, manufactures and commercializes over 130 human cell culture products, including frozen human primary cells and the reagents." The other "is a biotech company focused on the commercial development of biological products for the prevention and treatment of human diseases and manufacturing and sales of materials in producing vaccines." These fuller descriptions support Tregillis's reliance on these companies as comparable to Healthwise. Though their businesses incorporate more medical development, they appear to be focused on manufacturing.

At trial, the Quadris challenged Tregillis's opinion as unduly speculative on the ground that the companies were not sufficiently comparable. They cross-examined him on the issue, and also offered their own expert to testify that in his opinion the companies were not sufficiently comparable to use in valuing Healthwise. The Quadris' own expert also relied on the Pratt's Stats database and also used the market approach as a partial means of determining the company's value. We conclude the Pratt's Stats database and the business descriptions contained in it gave both experts a reasonable and nonspeculative basis for identifying comparable companies. To the extent there was a dispute over the experts' choices of comparable companies, the trial court did not abuse its discretion in admitting Tregillis's testimony and allowing the jury to make the factual determination.

The cases the Quadris rely on are not to the contrary. In *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 156-157, the plaintiff lost her trucking business when one of two trucks she had purchased failed to work adequately. Without the income from both trucks, she couldn't cover her payments on either, they were repossessed, and her business failed. She sued the truck manufacturer for breach of express and implied warranties and recovered—among other things—$105,600 in lost profits damages. (*Id.* at pp. 156, 161.) The evidence about her own business showed net losses for the two prior years. (*Id.* at p. 162.) But plaintiff introduced evidence of other trucking businesses. She showed 11 owner-operators working the same routes she worked earned average gross revenues of $60,000 to $66,000 a year for each truck, and an expert testified the national average net profit for owner-operators was 14 to 16 percent of revenue. (*Ibid.*) The expert then calculated Berge's lost profits as 16 percent of $66,000, or $10,560 for each truck each year, the exact lost profit damages the jury found. (*Ibid.*) The Court of Appeal held the expert's damages opinion was too speculative. (*Ibid.*) The court emphasized the expert made no effort to show the national average had any connection to plaintiff's business. (*Ibid.*) To prove lost profit damages, the court held, the plaintiff could rely on data from other businesses "only if she shows they operate under similar conditions, such as in the same area and with the same equipment." (*Id*. at p. 163.)

Berge is distinguishable from this case on several grounds. In the first place, the plaintiff introduced the expert opinion to prove lost profit damages, not the sale price of the company. Absent evidence of an established business's track record of earnings and expenses, calculating lost profits is inherently speculative. (See *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-693.) "The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists . . . it may be necessary to deny such recovery. [Citations.] If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883.) Thus, to prove lost profit damages without a track record, the courts require evidence to make reasonably certain the company would have earned profits and their extent. (*Ibid.*) The rule on establishing the valuation of a going business concern is not as severe. A business valuation expert is permitted to use the sales of other businesses as comparable sales. Those businesses must be comparable, and the expert must explain how they are so, but they need not be as tightly connected to the subject business as required to use information about their past profits to infer the future profitability of the subject business.[12]

Second, unlike the expert in *Berge*, Tregillis testified about his reasons for including and excluding as comparable businesses, companies contained in the Pratt's Stats database. He said he excluded companies too focused on research and development, he discounted the prices of companies with significant research and development components, and he excluded public companies who manufactured miscellaneous products. He also discounted the value of public pharmaceutical companies and made many other adjustments. By making these adjustments, Tregillis made an effort, which he explained to the jury, to connect the comparable companies he chose to Healthwise. The defendants also crossed-examined him about whether the other companies were truly comparable. The jury evidently credited his testimony.

Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113 (*Zuckerman*) is also inapt. *Zuckerman* was an eminent domain case where a utility acquired storage rights to an exhausted gas reservoir and separately entered an agreement to operate a well on an adjacent parcel and pay royalties on gas they extracted. (*Id.* at p. 1121.) The utility then bought gas from other sources and injected it into the reservoir to be used in periods of high demand. (*Ibid.*) Later, they learned the injected gas had migrated to the adjacent parcel and they were extracting and paying royalties on it. The

[12] *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281 is distinguishable on the same ground.

utility brought an eminent domain action to acquire the right to inject, store, and withdraw gas from beneath the adjacent parcel. (*Ibid.*) The trial court condemned the property for the utility and awarded the landowner, among other things, $6.93 million for the condemnation of the storage rights based on the valuation of the landowner's expert witness. (*Id.* at pp. 1128, 1138.)

The expert used "a modified comparable sales approach," because the property in question was unusual. Instead of using recent sales involving other storage facilities, however, he used the much earlier transaction where the utility had acquired storage and other rights in the same location as well as adjoining parcels. (*Zuckerman*, *supra*, 189 Cal.App.3d at pp. 1122, 1128.) The overall transaction was worth approximately $7.4 million and the parties pegged the value of the storage rights alone at approximately $1.64 million in a contemporaneous filing with regulators. (*Id.* at pp. 1129-1130.) The expert ignored that valuation, and derived his own by subtracting from $7.4 million the value of a subset of other rights acquired in the original transaction but not in the condemnation of storage rights. (*Id.* at pp. 1130-1131.) However, the expert failed to subtract from the original sale price "a number of surface and nonsurface rights and leaseholds, including oil and gas leases" as well as "the value of the gas in the storage reservoir" at the time of the earlier sale. (*Id.* at p. 1131.) By failing to account for those differences, the expert in *Zuckerman* created a fictional comparable sale that was not at all comparable.

The Court of Appeal concluded it could not "defer to the trial court's traditional role in drawing inferences and resolving conflicts in the evidence. In his evaluation [the expert] gave no consideration to more comparable transactions and relied instead on an adjustment of a temporally remote transaction. In adjusting the remote transaction to reflect modern values he rejected the [regulator-]approved valuation of the storage rights and included in his consideration several items of property rights which are not included in the . . . condemnation." (*Zuckerman, supra*, 189 Cal.App.3d at p. 1136.) Since the damages award rested entirely on the expert's opinion, the court found the award was not based on sufficient evidence, and reversed and remanded. (*Ibid.*)

We have no such concerns in this case. Unlike the expert in *Zuckerman*, Tregillis did not construct a favorable comparable sale. Instead, he found contemporary corporate sales to use as comparables, excluded transactions involving companies whose primary focus was research and development, and significantly discounted the weight of manufacturing companies with significant research divisions. As a result, he gave the jury material they could rely upon to exercise their traditional factfinding role. Though we believe the jury could have rejected the expert's conclusions based on concerns that the comparable sales were not sufficiently similar, we cannot conclude the court was required to keep that evidence from the jury entirely.

For all these reasons, we conclude the trial court did not err by concluding Tregillis's opinion on the business valuation was not too speculative and submitting the factual issue to the jury. We also conclude Tregillis's opinion was not so speculative that it couldn't, as a matter of law, constitute substantial evidence for the jury's verdict.

2. *Noneconomic damages*

The Quadris argue the jury's award to Alkayali of $500,000 in emotional distress damages is not supported by substantial evidence. We disagree.

To recover damages for emotional distress, the injury must be severe, that is, substantial or enduring, not trivial or transitory. (*Young v. Bank of America* (1983) 141 Cal.App.3d 108, 114; *Fletcher v. Western National Life Ins. Co*. (1970) 10 Cal.App.3d 376, 379.) The injury may include "'all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.'" (*Young*, at p. 114; *Fletcher*, at p. 397.)

Alkayali testified that as a result of the dissolution of Healthwise and the loss of his assets, he experienced severe anxiety, grief, and humiliation, as well as difficulty with his family, fear of eviction, and nightmares. Asked how he was harmed when he found out the Quadris had dissolved Healthwise, he said, "I wake up in the middle of the night feeling bad. I still do." He said he had believed Healthwise would be a valuable asset that he could draw upon, but the dissolution took from him the value of 30 years of hard work. "You can imagine the grief [when] you lose your 30 years of hard work. You built a company with integrity, quality product, invention of the century, and you lose that." Asked whether he suffered mentally, he said, "Mental, you know, you fight with your family. You fight with your wife about this, no money. My house has been in foreclosure for three years. I have every day, every month we have the Sheriff come evict us from our house. It's a nightmare is all I can say." He also said he felt humiliated because "my name was dragged into the dirt. My name dirty. My integrity is being damaged." He claimed he was "having nightmare[s] all the time."

This testimony provides ample evidence to support the jury's finding his emotional distress was substantial and proximately caused by the Quadris' dissolution of Healthwise. (See *Young v. Bank of America*, *supra*, 141 Cal.App.3d at p. 115 [testimony that feelings of embarrassment and shame, helplessness and frustration, as well as severe stress, nervousness, headaches, and insomnia provided substantial evidence to support instructing jury on emotional distress].)

The Quadris argue Alkayali conflated his emotional distress from the prior litigation over the ownership of NeoCell and his distress over the dissolution of Healthwise. While it is true Alkayali referred to feelings of stress that preceded the dissolution of Healthwise, he also testified to distress that occurred after the dissolution and explicitly tied the stress to the dissolution. The court correctly instructed the jury he would be entitled to damages based on the conduct of the Quadris only "in connection with the dissolution of Healthwise and disposing of its assets." "Absent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.) The Quadris have identified nothing in the record to indicate the jury ignored the court's instruction, we conclude the jury heard the evidence and decided Alkayali had testified to severe emotional distress arising from the dissolution of Healthwise. (*Harper v. City of Los Angeles* (9th Cir. 2008) 533 F.3d 1010, 1029 ["[T]he City argues that the damage award was not properly apportioned between the harms . . . [plaintiffs] suffered [from two separate incidents] . . . There is no indication that the jury improperly took these other incidents into account, especially where, as here, the City has not challenged any aspect of the jury instructions. Rather, the jury had substantial evidence to conclude that, on [one of the] charges alone, the [plaintiff] suffered harm and should be awarded damages"].) We therefore affirm the emotional distress damages award.

3. *Punitive damages*

Quadri argues we should reverse the award of $185,000 in punitive damages to Alkayali because he did not present sufficient evidence of Quadri's financial condition.

Specifically, Quadri contends Alkayali showed only (i) Quadri owns a home he purchased for $400,000, (ii) Quadri owns a company called NeoCell Manufacturing and Packaging (to pack product for NeoCell) which owns a 33,000 square foot building in Irvine purchased for $4 million, (iii) the Quadris had income from NeoCell of about $92,000 in 2014 and expected income of about $150,000 in 2015, and (iv) NeoCell had profits of about $1 million in 2014. He argues this evidence is insufficient because Alkayali did not provide evidence of the Quadris' debt on the property or their other expenses or liabilities.

Alkayali concedes he did not put on evidence of Quadris' expenses and liabilities. However, he points out the evidence that NeoCell had earnings of approximately $21 million in 2014 and the company's costs for 2015 included a $300,000 charitable donation. Alkayali argues the evidence Quadri recounts, together with the evidence of NeoCell's apparently strong financial circumstances, is sufficient to show Quadri can repay the award without suffering undue financial harm.

"In assessing whether a punitive damages award is excessive relative to the defendant's wealth, 'the key question . . . is whether the amount of damages "exceeds the level necessary to properly punish and deter." [Citations.]' [Citation.] Calculation of punitive damages 'involves . . . "a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants."' [Citation.] These factors are not evaluated under a rigid formula. 'Whether punitive damages should be awarded and the amount of such an award are issues for the jury and for the trial court on a new trial motion. All presumptions favor the correctness of the verdict and judgment. [Citation.]' [Citation.] '"Juries . . . have a wide discretion in determining what is proper. [Citation.]" [Citation.]'" (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 78.)

"In reviewing the verdict the appellate court is guided by three main factors: the reprehensibility of the defendant's conduct, the actual harm suffered by the victims, and the wealth of the defendant." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 623.) "Because the important question is whether the punitive damages will have the deterrent effect without being excessive, an award that is reasonable in light of the . . . reprehensibility of the defendant's conduct and injury to the victims, may nevertheless 'be so disproportionate to the defendant's ability to pay that the award is excessive' for that reason alone." (*Id.* at p. 620.) Quadri not does challenge the punitive damages award as unjustified in view of the reprehensibility of his conduct or the actual harm Alkayali suffered, but only because it is excessive in relation to his ability to pay.

We conclude the award is defensible. The jury's punitive damages verdict and the trial court's denial of Quadris' motions for judgment notwithstanding the verdict and for new trial imply they accepted Alkayali's assessment that Quadris could pay the $185,000 punitive damages award. This implied factual finding is supported by the evidence. In 2014, NeoCell had approximately $21 million in revenues and realized a profit of approximately $1 million. The Quadris received approximately $92,000 and $150,000 in income from the company in 2014 and 2015. Moreover, the company was able to make a charitable donation of $300,000 in 2015. NeoCell Manufacturing, a second company the Quadris own, was able to obtain financing to purchase a 33,000 square foot building worth, at the time of purchase, $4 million. The jury's punitive damages award of $185,000 amounted to approximately 18.5 percent of NeoCell's annual net profit, less than half the 37.5 percent of net profit approved by our colleagues in *Bankhead v. ArvinMeritor, Inc.*, *supra*, 205 Cal.App.4th at p. 83. It is also significantly less than the charitable donation NeoCell made in 2015. We realize the damages award was against

Quadri himself, not NeoCell. However, Quadri and his wife are the sole owners of both NeoCell and NeoCell Manufacturing.

Under these circumstances, we cannot say the jury's punitive damages award is so disproportionate to Quadri's ability to pay as to imply the award resulted from passion or prejudice. The evidence gave the jury a sound basis to conclude an award of that magnitude was necessary and appropriate to punish Quadri for and deter him from his misconduct, which the jury found to be malicious.

III

DISPOSITION

We affirm the judgment and award Alkayali his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.